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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARINA PACIFIC ASSOCIATES,

Cross-complainant and
Respondent,

v.

STUART HOFFMAN,

Cross-defendant and Appellant.

B207983

(Los Angeles County
Super. Ct. No. BS092794)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Elihu M. Berle, Judge. Reversed.

Stuart Hoffman, in pro. per., for Cross-defendant and Appellant.

Lewis Brisbois Bisgaard & Smith, Howard A. Slavin; Weiss & Jones, Philip E.
Weiss; Sheldon H. Sloan, Caroline Chan for Cross-complainant and Respondent.

Stuart Hoffman appeals from a judgment in the amount of \$225,000, entered in favor of respondent Marina Pacific Associates, after Marina Pacific prevailed on a single cause of action, for breach of a Boat Slip Lease, in its cross-complaint. We reverse.

Facts

In April 2001, Hoffman and Marina Pacific entered into a Boat Slip Lease, in which Hoffman leased a slip in the Marina Harbor Anchorage in Marina del Rey. (Marina Pacific has a leasehold interest in the Marina.) After that, Hoffman lived on his boat, as a legal "liveaboard."

Even when the lease was signed, Marina Pacific was planning to redesign and reconstruct the Marina, resulting in fewer boat slips. Coastal development permits were issued in 2001. Opponents of the project, including the Coalition to Save the Marina, filed three lawsuits challenging the project. All three settled in May of 2002, and construction began in November of that year. The construction took place in phases, with different parts of the Marina scheduled for reconstruction at different times. According to Marina Pacific, a phase of construction could not begin until liveaboard tenants had moved their boats.

Hoffman's slip was in the last part of the Marina to be reconstructed. By letter of January 19, 2005, Hoffman was informed that his dock would be demolished and rebuilt during the fall and winter of 2005-2006. The letter states that it is "official notice" that he would be required to vacate by September 6, 2005. Then, by letter of March 4, 2005, Marina Pacific notified Hoffman that it was terminating his lease effective May 6, 2005. The letter states that it is "official NOTICE OF TERMINATION OF YOUR BOAT SLIP LEASE." Marina Pacific sent Hoffman another letter on May 2, 2005. This letter states that it is a final reminder that Hoffman's boat had to be out of the Marina by midnight on May 6.

According to declarations and documents submitted by Marina Pacific at various points in this litigation, Hoffman contacted Marina Pacific on or about May 6, seeking

some accommodation. In response, Marina Pacific agreed that he could stay for 30 days beyond the May 6 deadline. On May 25, the parties signed a new contract. This was a Temporary Moorage Contract which allowed Hoffman to stay at a daily rate. This contract lists a "date in" of May 27 and a "date out" of June 6, 2005.

In the meantime, in September 2004, this lawsuit was filed by the Coalition to Save the Marina, Inc., Hoffman, and others. The sole defendant was the County of Los Angeles and the complaint alleged that specified County ordinances defining "seaworthiness" conflicted with state law. However, on May 24, 2005, a first amended complaint was filed, adding Marina Pacific as a defendant. Against Marina Pacific, the complaint alleged that the eviction violated Civil Code section 1940.6 (part of the landlord-tenant law) and Government Code section 7060.2, concerning rental accommodations controlled by a public entity. The complaint sought an injunction prohibiting Marina Pacific from evicting Hoffman from his boat slip, and similar relief.

Hoffman also moved for a temporary restraining order, then an injunction, seeking to prohibit Marina Pacific from evicting him and/or requiring Marina Pacific to provide him with a boat slip during the reconstruction. He alleged, inter alia, that Marina Pacific had made various promises concerning relocation of boat slip tenants and that the Coastal Commission permit required Marina Pacific to allow existing tenants the opportunity to move to other slips. The motions were unsuccessful, and on June 13, 2005, Hoffman moved his boat from the Marina.

On July 5, 2005, Marina Pacific filed a cross-complaint against Hoffman, the Coalition, and the other individual plaintiffs. The cross-complaint brought causes of action against all defendants for breach of the May 2002 settlement agreement (alleging that Hoffman was a member or officer of the Coalition, and that by filing the instant litigation he and the other defendants breached that agreement) and intentional interference with prospective economic advantage (alleging that the complaint was filed in order to interfere with Marina Pacific's business, and that the injunction requested would have prevented Marina Pacific from reconstructing the Marina). As to Hoffman,

there were also causes of action for breach of the Boat Slip Lease and breach of the Temporary Moorage Contract. The complaint included a prayer for costs of suit, including contractually recoverable attorney's fees.

The cause of action for breach of the Boat Slip Lease alleged that Hoffman breached the lease by failing to vacate by May 6, 2005. A copy of the Lease was attached. It provides, inter alia, "Costs and Expenses. Lessee shall [obscured] all costs and expenses incurred by Management [obscured] but not limited to attorneys' fees, to enforce any portion of this Lease which has been breached by the Lessee, whether or not suit is filed."

The cause of action for breach of the Temporary Moorage Agreement alleges that after the termination of Hoffman's lease, Marina Pacific agreed that Hoffman could remain for another 30 days, provided that he execute a Temporary Moorage Contract with a "date out" of June 6, 2005. The cross-complaint further alleged that Hoffman breached the Temporary Moorage Agreement by failing to remove his boat by June 6. A copy of the Temporary Moorage Agreement is attached to the cross-complaint. It is dated May 25, 2005, and is signed by Hoffman and by a representative for Marina Pacific. It does not include an attorney's fees clause.

Marina Pacific moved for summary judgment on the complaint and cross-complaint. On May 21, 2007, its motion was granted as to the complaint and denied as to the cross-complaint. The Notice of Ruling, prepared by Marina Pacific, was filed and served on July 27, 2007. It recites that judgment was entered in favor of Marina Pacific on the complaint.

All parties except Hoffman then settled the cross-complaint. The cross-complaint against Hoffman was tried to the court and took place on March 10, 2008.

In his opening statement, counsel for Marina Pacific told the court that its claim was for "attorneys' fees and costs to be awarded pursuant to Marina Pacific Associates having obtained summary judgment on the [second] amended complaint that involves Mr. Hoffman's claim for a preliminary and temporary injunction and to prohibit Marina

Pacific from going forward with its renovation of the Marina Harbor," also saying that "since Marina Pacific Associations as a defendant was successful in obtaining summary judgment, that one of the items that we will be seeking as a defendant because of the summary judgment is the obtaining of attorneys' fees and costs to which we are entitled because of the breach by Stuart Hoffman of his moorage agreement" Marina Pacific made similar arguments in closing, asking for all fees and costs it had incurred in prosecution and defense of the entire action.

Marina Pacific called Hoffman, who authenticated his signature on the Boat Slip Lease and testified that he had received notice that he was required to move his boat. He was also questioned about the Temporary Moorage Agreement, and authenticated his signature on that document.

Relevant to the cause of action for breach of the 2002 settlement agreement, Hoffman was asked about his membership in the Coalition, and testified that he had never been a member. Marina Pacific asked the court to take judicial notice of the first amended complaint in this action, which alleges that Hoffman was a member of the Coalition and on its Executive Committee. Marina Pacific also called one of its lawyers in this matter, Philip Weiss, who testified that certain documents had been obtained in discovery from the Coalition, on the theory that these documents indicated that Hoffman was a member of the Coalition. The documents were not introduced into evidence.

Relevant to the cause of action for interference with prospective economic advantage, Marina Pacific asked Hoffman whether he had "prevented for a period of time Marina Pacific from taking steps to renovate the marina because your boat remained there." He answered that he had not, and on cross-examination of Marina Pacific's witnesses established that construction in that area did not begin until September, and that Hoffman's slip was leased to another boat for several weeks after he vacated and before construction began.

Marina Pacific's final witness was David Levine, Chief of Staff to the co-General Partner of Marina Pacific. He testified that the Temporary Moorage Contract had been

negotiated between the parties, and that it allowed Hoffman to stay until June 6, 2005 and that Hoffman had breached the Boat Slip Lease by failing to vacate after 30 days' notice, and through trespass, testifying that under maritime law, a vehicle is a person and the presence of the boat after a lease terminates is a trespass. He also testified that the reason that liveaboards were asked to vacate well before construction began was "to facilitate a smoother transition for boaters so they could leave the anchorage in time for construction to begin."

Levine offered the only testimony on damages, that "as a result of the actions that Marina Pacific has had to defend" it had incurred approximately \$225,000 in attorney fees and costs.

Marina Pacific introduced a copy of the Boat Slip Lease, the first amended complaint in this action, the settlement agreement in the earlier litigation, and its March 4, and May 2, 2005 letters to Hoffman.¹

The court found that it was undisputed Hoffman had entered into the April 2002 lease, that the lease had a fees clause, and that Marina Pacific had incurred \$225,000 in fees and costs "in this matter," and entered judgment for Marina Pacific in the amount of \$225,000. Marina Pacific asked the court to find that Hoffman had breached the settlement agreement, but the court found that Hoffman was not a party to the settlement agreement, and refused to make that finding.

Discussion

Hoffman challenges the sufficiency of the evidence for the finding of breach of the Boat Slip Lease, and the damages award. Hoffman's argument on the breach of contract is that he was not in breach because he was (through his application for a restraining order) litigating his right to remain at the Marina, and because the eviction was

¹ Marina Pacific has lodged numerous additional documents as trial exhibits. They were not offered or admitted into evidence. They were not part of the trial court record, and thus are not properly before us. We do not consider them.

retaliatory. We cannot see that Hoffman established the elements of a retaliatory eviction (Civ. Code, § 1942.5) or that an application for a restraining order allows a tenant to remain in possession after the end of a lease.

Nonetheless, the judgment must be reversed. First, Marina Pacific cannot recover for breach of the Boat Slip Lease because it did not prove breach of the Boat Slip Lease. Instead, Marina Pacific itself pled and proved that when Hoffman failed to leave, it agreed that he could stay for an additional 30 days, and entered into a second agreement with him which replaced the lease. In other words, Marina Pacific introduced evidence that it excused any breach. Having agreed that Hoffman could stay until June 6, it cannot prevail on a breach of contract theory for his failure to leave on May 6.²

Marina Pacific contends that Hoffman waived this argument because he failed to raise it in the trial court, and failed to introduce a copy of the Temporary Moorage Agreement.³ We cannot see that the failure to raise the issue or introduce a copy of the Agreement is fatal. Hoffman's claim is one of sufficiency of the evidence. Marina Pacific introduced evidence that a temporary moorage contract had been negotiated and signed, and thus did not prove its case for breach of the Boat Slip Lease.

² It is also true that a lessee's breach is waived when the lessor accepts rent, with knowledge of the breach. (*EDC Associates Ltd. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170.) Hoffman's complaint alleged that Marina Pacific cashed his check for his May rent, and in his brief he asserts that he paid rent at the rate specified in the Temporary Moorage Contract from the inception of that contract through June 13. We do not see facts in the record to support those contentions -- but we do note that Marina Pacific nowhere claimed that Hoffman was in breach of either agreement for failure to pay rent, or that he failed to pay rent through June 13.

³ On this appeal, Marina Pacific also seems to argue that Hoffman also breached the Temporary Moorage Agreement, because he stayed after June 6. Perhaps, but Marina Pacific did not prevail on that cause of action. We could not in any event affirm the judgment based on breach of the Temporary Moorage Agreement, because that contract does not include a fees clause.

There is a second problem with the finding of breach of the Boat Slip Lease. As Marina Pacific acknowledges, one of the elements of a cause of action for breach of contract is damages. Marina Pacific did not prove damages. It introduced no evidence that it suffered any harm from Hoffman's presence in the Marina after May 6. Instead, the evidence was that liveaboards were asked to leave well before construction began for their own benefit, not for Marina Pacific's. Marina Pacific did not even incur the cost of evicting Hoffman. He had moved his boat from the Marina before Marina Pacific filed its cross-complaint.

Additional factors compel reversal of this judgment. For one thing, Marina Pacific never made a noticed motion for fees under Code of Civil Procedure section 1033.5. Hoffman argues that such a motion was required. Marina Pacific asserts that it did not need to file a motion because it was not seeking fees as costs, but fees as damages. We agree with Hoffman.

Marina Pacific relies on *M. C. & D. Capital Corp. v. Gilmaker* (1988) 204 Cal.App.3d 671, 676, which held that fees pursuant to contract are recoverable as damages, and must be pled and proved, and *City Inv. Co. v. Pringle* (1920) 49 Cal.App. 353, 355, which held that attorney's fees pursuant to contract cannot be allowed as costs.

Neither case reflects the current state of the law. In 1990, the Legislature amended Code of Civil Procedure section 1033.5, finding and declaring that ". . . there is great uncertainty as to the procedure to be followed in awarding attorney's fees where entitlement thereto is provided by contract to the prevailing party. It is the intent of the Legislature in enacting this act to confirm that these attorney's fees are costs" (Stats. 1990, ch. 804, § 2.)" (*Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 264, *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797.) Under current law, fees must be claimed as costs, and cannot be claimed as damages.

What is more, the award would fail even if Marina Pacific were correct, and could avoid the requirements of Code of Civil Procedure section 1033.5 and the Rules of Court by seeking fees as damages rather than as costs. Marina Pacific sought and was awarded

fees for the entire litigation. There is simply no causal link between those fees and a breach of the Boat Slip Lease.

Marina Pacific argues that even if a motion was required, its oral request for fees as damages was sufficient. It was not. A noticed, written, motion for fees as costs is mandatory. (*Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717.)

Marina Pacific's problem in this regard is compounded by the fact that it sought fees on the complaint (as opposed to the cross-complaint) more than seven months after judgment was entered on the complaint. (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, Cal. Rules of Court, rule 3.1702, subd. (b), rule 8.104.) The time to file such a motion had long since expired.

Hoffman makes additional arguments, that there was no foundation for Levine's testimony concerning fees, that Marina Pacific did not prevail on all causes of action in the cross-complaint and thus should not have recovered all its fees, and so on. We reverse the judgment for the reasons already stated, and have no need to consider those arguments.

Disposition

The judgment is reversed. Appellant to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.